FEDERAL COURT OF AUSTRALIA

Pitman v Commissioner of Taxation [2021] FCAFC 230

Appeal from:	Debbie Pitman v Commissioner of Taxation (Administrative Appeals Tribunal, No. 2020/5086; 2020/5087; 2020/5088, 21 December 2020)
File number:	VID 44 of 2021
Judgment of:	**ALLSOP CJ, DAVIES AND BROMWICH JJ**
Date of judgment:	16 December 2021
Catchwords:	**TAXATION** – appeal from decision of the Administrative Appeals Tribunal that bankrupt applicant had no standing to extend time to seek review of Commissioner's objection decision because applicant not a person "*dissatisfied*" within the meaning of s 14ZZ(1) *Taxation Administration Act 1953* (Cth) – where after bankruptcy, applicant charged with four criminal offences under State law related to the tax debt or administration of bankrupt estate – whether successful review of objection decision would have any relevance to charges or conduct of criminal trial so as to make the applicant a person "dissatisfied", that is with an interest beyond the effect of bankruptcy – limited evidence to support that factual inquiry – no error in Tribunal's reasoning or application of *McCallum v Commissioner of Taxation* [1997] FCA 533; 75 FCR 458 – appeal dismissed. **PRACTICE AND PROCEDURE** – primacy of Full Court authority, including in original jurisdiction – no argument advanced that long standing Full Court authority in *McCallum v Commissioner of Taxation* [1997] FCA 533; 75 FCR 458 plainly wrong – court declined to reconsider. **CONSTITUTIONAL LAW –** whether s 14ZZ imposes incontestable tax liability.
Legislation:	*Administrative Appeals Tribunal Act 1975* (Cth) s 44 *Administrative Decisions (Judicial Review) Act 1977* (Cth) ss 5(1), 6(1), 12(1) *Bankruptcy Act 1966* (Cth) s 134(1)(j) *Crimes Act 1958* (Vic) s 82(1) *Federal Court of Australia Act 1976* (Cth) *Income Tax Assessment Act 1936* (Cth) *Judiciary Act 1903* (Cth) s 78B

	Taxation Administration Act 1953 (Cth) s 14ZZ(1)
Cases cited:	*Attorney-General (Vic) v Commonwealth* [1945] HCA 30; 71 CLR 237 *Australian Securities Commission v Marlborough Gold Mines Ltd* [1993] HCA 15; 177 CLR 485 *Boensch v Pascoe* [2019] HCA 49; 268 CLR 593 *Cummings v Claremont Petroleum NL* [1996] HCA 19; 185 CLR 124 *Deputy Commissioner of Taxation v Buzadzic* [2019] VSCA 221 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22; 230 CLR 89 *Federal Commissioner of Taxation v Bosanac* [2016] FCA 448; 103 ATR 51 *Giris Pty Ltd v Commissioner of Taxation (Cth)* [1969] HCA 5; 119 CLR 365 *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* [2008] HCA 4; 234 CLR 532 *McCallum v Commissioner of Taxation* [1997] FCA 533; 75 FCR 458 *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v FAK19* [2021] FCAFC 153 *R v Falzon* [2018] HCA 29; 264 CLR 361
Division:	General Division
Registry:	Victoria
National Practice Area:	Taxation
Number of paragraphs:	36
Date of hearing:	24 August 2021
Counsel for the Applicant:	Dr NF Orow
Solicitor for the Applicant:	Radovic Lawyers
Counsel for the Respondent:	Mr P Hanks QC and Ms C Horan
Solicitor for the Respondent:	ATO Review and Dispute Resolution

ORDERS

VID 44 of 2021

BETWEEN:	**DEBBIE PITMAN** Applicant
AND:	**COMMISSIONER OF TAXATION** Respondent

ORDER MADE BY:	**ALLSOP CJ, DAVIES AND BROMWICH JJ**
DATE OF ORDER:	**16 DECEMBER 2021**

THE COURT ORDERS THAT:

1. The appeal be dismissed with costs.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

ALLSOP CJ:

1 I have read the reasons to be published of Davies J. I agree with her Honour's reasons and with the orders that she proposes. I have also read the reasons of Bromwich J and I also agree with those reasons.

2 I wish to add only two comments, both of which are consistent with the reasons of Davies J and Bromwich J.

3 First, as to *McCallum v Commissioner of Taxation* [1997] FCA 533; 75 FCR 458, it is to be noted that the Full Court in that case was sitting (as we are) in the original jurisdiction, although hearing a statutory "appeal" from the Administrative Appeals Tribunal. Justice Davies has set out what I said in *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v FAK19* [2021] FCAFC 153 at [2]–[13]. It is also necessary to reiterate the primacy of Full Court authority in this Court. As in *FAK19* there was no argument on the matter, but for all the reasons set out in *FAK19* at [14]–[29], in particular the reasons directed to the text and structure of the *Federal Court of Australia Act 1976* (Cth), Full Court decisions in the original jurisdiction (often sat for the purpose of expressing a view on a legal or constructional question) should not be viewed somehow as of lesser authority than Full Court decisions in the appellate jurisdiction.

4 Secondly, the Tribunal here dealt with the matters put to it. There was no error of law in how it addressed the limited evidence and the submissions. It may well be, however, that in a given and different set of circumstances, a bankrupt taxpayer is "dissatisfied" within the meaning of the statute. It may be that the liability to tax said by the bankrupt taxpayer to have been wrongly imposed, is critical to the elements of a criminal charge concerned with the taxpayer's taxation affairs. But it should not be thought that such a conclusion built on logical legal analysis of the elements of the offence is the only way one could demonstrate the requisite standing of "dissatisfaction" in circumstances where the taxpayer has been charged with a criminal offence concerned with his or her taxation affairs. Juries do not always reason in strictly logical or analytical ways. If there were *evidence* from someone of relevant experience that the overturning of the assessment could be a material factor (whether entirely logical or analytically satisfying) in persuading a jury of the innocence of the

taxpayer in a criminal trial, such would be relevant to the evaluation of the question as to "dissatisfaction" and so standing.

I certify that the preceding four (4) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Chief Justice Allsop.

Associate:

Dated: 16 December 2021

REASONS FOR JUDGMENT

DAVIES J:

5 The applicant (**Ms Pitman**) has appealed the decision of the Administrative Appeals Tribunal (**the Tribunal**) that she lacked standing to seek review of an objection decision made by the Commissioner of Taxation (**the Commissioner**) because she was not a person "dissatisfied" with the objection decision within the meaning of s 14ZZ of the *Taxation Administration Act 1953* (Cth) (***Taxation Administration Act***). At the time of the hearing, Ms Pitman was an undischarged bankrupt and counsel for Ms Pitman conceded at the hearing that *McCallum v Commissioner of Taxation* [1997] FCA 533; 75 FCR 458 (***McCallum***) is authority that ordinarily a person who is a bankrupt would not have standing to seek a review of an objection decision. That is because bankruptcy operates to release the bankrupt from liability for the tax debt, with the consequence that the bankrupt is not a person upon whom the objection decision will continue to have legal effect. It was argued, however, that the objection decision in Ms Pitman's case had consequences for her aside from the tax debt, because she had been charged, since she became bankrupt, with three counts of obtaining a financial advantage by deception from the Australian Taxation Office (**ATO**) (by evading the tax debt) and one offence of conspiring with another to cheat and defraud the ATO of her income tax debt by deception. It was argued that Ms Pitman had continued cause for "dissatisfaction" with the Commissioner's objection decision, notwithstanding her bankruptcy, because a successful review of the objection decision would have relevance for the criminal charges against her. The only evidence led to support that contention was the charge sheet; with the claim that a successful objection decision would have relevance to those charges asserted as a matter of submission. The Tribunal rejected that claim after reviewing the charges against Ms Pitman, and was not satisfied that a successful outcome for Ms Pitman on review of the objection decision could have any relevance in the hearing of the four criminal charges pending against Ms Pitman. The Tribunal accordingly determined that it was not satisfied that Ms Pitman was a person "dissatisfied" with the objection decision. By this appeal, counsel for Ms Pitman now seeks to challenge the correctness of the long standing authority of *McCallum*. Two substantive grounds were advanced.

6 The first ground raised a constitutional point (which was the subject of notices under s 78B of the *Judiciary Act 1903* (Cth) to State and Commonwealth Attorneys General, but none

wished to be heard on the constitutional issue) – namely, that it is a constitutional requirement that a tax may not be made incontestable and a construction of s 14ZZ that would operate to impose an incontestable tax liability on a taxpayer, whether in its legal operation or practical impact, should be avoided if another construction is open that would preserve the validity of the law. The proposition, as a point of law, is correct. It is a tenet of statutory construction that a court should prefer an interpretation of a statutory provision that renders the provision constitutionally valid over an interpretation that would render the provision invalid (*Attorney-General (Vic) v Commonwealth* [1945] HCA 30; 71 CLR 237, 267 (Dixon J); *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* [2008] HCA 4; 234 CLR 532, 553 [11] (Gummow, Hayne, Heydon and Kiefel JJ)), however that rule does not assist Ms Pitman on the construction of s 14ZZ(1)(a) of the *Taxation Administration Act*. There are two reasons.

7 First, a tax is not relevantly "incontestable" merely because "in a purely practical sense" it is "not always susceptible of challenge": *Giris Pty Ltd v Commissioner of Taxation (Cth)* [1969] HCA 5; 119 CLR 365 (***Giris***), 378–379. In *Giris*, Kitto J explained that the expression "incontestable tax" refers to "a tax provided by a law which, while making the taxpayer's liability depend upon specified criteria, purports to deny him all right to resist an assessment by proving in the courts that the criteria of liability were not satisfied in his case" (378–379). In other words, a tax becomes an incontestable tax (and would therefore be invalid) if the tax is payable, irrespective of whether the criteria for the imposition of the tax are met. Section 14ZZ does not have such an operation. To the contrary, s 14ZZ gives a "dissatisfied" taxpayer the right to contest an objection decision on an objection against an assessment, either in review proceedings in the Tribunal or by way of appeal to the Federal Court of Australia (**Federal Court**). Section 14ZZ, by the criterion that a taxpayer be dissatisfied with an objection decision, merely prescribes who may exercise the statutory review/appeal rights under the Pt IVC process. The section does not make the imposition of tax unchallengeable in the constitutional sense.

8 Secondly, it is well settled law that a bankrupt's trustee has the power to bring, institute or defend any action or other legal proceeding relating to the administration of a bankrupt's estate: s 134(1)(j) of the *Bankruptcy Act 1966* (Cth). A review of an objection decision under Pt IVC of the *Taxation Administration Act* is a "legal proceeding" that a trustee is empowered to institute: *McCallum* 471 (Whitlam J), 474 (Lehane J); *Federal Commissioner of Taxation*

v Bosanac [2016] FCA 448; 103 ATR 51 (***Bosanac***), [76]. Lehane J observed in *McCallum* at 475–476:

> [A] bankrupt taxpayer, who wishes to challenge an assessment but lacks standing to do so, is not left without remedy. An extended passage in the majority judgment in *Cummings*, at 138, 139, emphasises that the Court will use its power to prevent injustice or oppression and that the power is available, and may be exercised (at least if it can be done without cost to the estate), even if its exercise is sought only for the purpose of vindicating a claim or interest personal to the bankrupt.

See also: *McCallum*, 471 (Whitlam J); *Bosanac*, [76]–[77]; *Deputy Commissioner of Taxation v Buzadzic* [2019] VSCA 221. As McKerracher J stated in *Bosanac* at [79], if a trustee declined to elect to proceed with Pt IVC proceedings or, on application by the bankrupt to review the trustee's decision, the Court did not intervene with that decision, it is not the contestability principle that is infringed. Rather the assessment under consideration would "in a purely practical sense" not be susceptible of challenge by the taxpayer.

9 The second ground was a challenge to the correctness of the majority decision in *McCallum.* In *McCallum*, the majority (Whitlam and Lehane JJ, Hill J dissenting) held that an undischarged bankrupt, "in the usual case", is unable to show that he or she is a person "dissatisfied" with the objection decision within the meaning of s 14ZZ of the *Taxation Administration Act*, thus with standing to seek a review or "appeal" the objection decision, where the cause of dissatisfaction is the taxation debt, "since he [or she] will have been divested of liability for the taxation debt" (at 470). In dissent, Hill J held that it did not need to be demonstrated that a legal right was affected for dissatisfaction to be made out and that it sufficed to show that the taxpayer had an adverse objection decision which the taxpayer sought to challenge by way of review or appeal. The appellant argued that the dissenting judgment of Hill J should be followed and put a number of arguments in support of that submission. No warrant has been shown, however, for this Court to reconsider the correctness of the majority decision in *McCallum.*

10 The High Court has long emphasised that an appellate court is bound to follow a prior decision of another appellate court unless persuaded that the prior decision is plainly wrong: *Australian Securities Commission v Marlborough Gold Mines Ltd* [1993] HCA 15; 177 CLR 485; *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22; 230 CLR 89, 152 [135]; *R v Falzon* [2018] HCA 29; 264 CLR 361, [49]. Both the requirement to adhere to authority unless persuaded that the earlier decision is plainly wrong and the rationale

behind that requirement were explained recently by Allsop CJ in *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v FAK19* [2021] FCAFC 153 at [2]–[13] and it is worthwhile setting out those paragraphs in full:

> 2 The phrase "plainly wrong" has its contemporary roots in the High Court's clear instruction in *Australian Securities Commission v Marlborough Gold Mines Ltd* [1993] HCA 15; 177 CLR 485 at 492 and *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22; 230 CLR 89 at 152 [135]. In *Marlborough Gold Mines* the Court (Mason CJ, Brennan, Dawson, Toohey and Gaudron JJ) was concerned with uniform State and Territory and in that sense national legislation, and Commonwealth legislation. In *Farah Constructions* the Court (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ) was concerned with the common law (in the sense of general or non-statutory law, including principles of Equity) of Australia. The principle, directed at the respect to be paid to prior decisions of intermediate appellate courts in the Federation, was that intermediate appellate courts and trial judges should not depart from such a decision unless convinced that it was plainly wrong.
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> 3 The phrase "plainly wrong" is now in widespread use and has been used many times by single judges of this Court in the original jurisdiction about decisions of their colleagues and by Full Courts of this Court in respect of earlier Full Court decisions. (See Lucas, R "Plainly wrong: The application of the Federal Court's threshold of error" (2020) 48 *Australian Bar Review* 372.) The phrase is sometimes used (incorrectly) as if it had a fixed content of meaning.
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> 4 The circumstances in which a court of appeal should depart from an earlier appellate decision of the court was stated by Dawson, Toohey and McHugh JJ in *Nguyen v Nguyen* [1990] HCA 9; 169 CLR 245 at 268–269 "to be a matter of practice for the court to determine for itself"; but that any such departure should be done "cautiously and only when compelled to the conclusion that the earlier decision is wrong". Their Honours said that the "occasions upon which the departure from previous authority is corrected are infrequent and exceptional".
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> 5 This expression of the matter must now be read with the recognition of a national integrated legal system and one Australian common law. As the New South Wales Court of Appeal (Allsop P, Beazley and Basten JJA) said in *Gett v Tabet* [2009] NSWCA 76; 254 ALR 504 at 562 [278] referring to these passages in *Nguyen*:
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> > It is no doubt important that the two paragraphs from *Nguyen* set out above be read together. The constitutional importance of the doctrine of precedent cannot be entirely at large within a national integrated legal system to the extent that each intermediate appellate court is entitled to determine for itself its own practice with respect to following earlier decisions. That is particularly so in circumstances where, as will be seen below, intermediate appellate courts are required to take into account, and in some circumstances follow, decisions of courts of co-ordinate jurisdiction. The first sentence in the latter paragraph cited above involves a statement of constraining principle; the second appears to identify the consequence which

should flow from the application of the principle of constraint. Like similar statements in relation to prosecution appeals against sentence, the effects of applying the principle are likely to depend upon how it is understood by lawyers and courts.

6 In *Chamberlain v The Queen* [1983] FCA 74; 46 ALR 493 at 498 the first Chief Justice of this Court and one of its most experienced judges (Forster J) said the following:

> We do not regard this Court as being bound by its previous decisions. However, we will normally follow an earlier decision unless convinced that it is wrong.

7 The departure requires necessity for conviction as to error. As Chief Justice Gleeson said when Chief Justice of New South Wales in *Clutha Developments Pty Ltd v Barry* (1989) 18 NSWLR 86 at 100:

> ... it is generally accepted that before it is appropriate for an appellate court to overrule one of its earlier decisions it must entertain a strong conviction as to the incorrectness of the earlier decision.

8 The jurisprudence of this Court on the question of departure from earlier Full Court authority is most clearly to be found after *Chamberlain* in *Transurban City Link Ltd v Allan* [1999] FCA 1723; 95 FCR 553 at 560–561 [26]–[31] (Black CJ, Hill, Sundberg, Marshall and Kenny JJ); and *New Zealand v Moloney* [2006] FCAFC 143; 154 FCR 250 at 275 [133]–[137] (Black CJ, Branson, Weinberg, Bennett and Lander JJ).

9 It is a mistake to fix upon one expression of some fixed content within the words "plainly wrong". It does not just mean "obviously" wrong: *Gett v Tabet* 254 ALR at 565–566 [294]. In, if I may respectfully say, a most helpful discussion in *Transurban* 95 FCR at 560–561 the Court recognised the need to balance the risk of perpetuation of error in too rigid a stance in reconsideration of earlier decisions and the importance of the stable operation of the doctrine of precedent and the predictability of the law. The Court in *Transurban* referred at 560–561 to what had been said in *Nguyen*, *Marlborough Gold* and *Chamberlain*, amongst other cases. After referring to the concluding expression of principle by Dawson, Toohey and McHugh JJ in *Nguyen* as to the inappropriateness of intermediate appeal courts considering themselves strictly bound by their earlier decisions and the risk of too rigid an adherence to precedent thereby which may perpetuate error, the Court said at 95 FCR 561 [31]:

> Beyond this principle, we do not think it possible, or even desirable, to formulate exhaustive criteria upon which this Court should act when asked to reconsider an earlier decision, for so much will depend upon the nature of the controversy, the strength of the arguments, and the particular circumstances attendant upon the case.

See also *SZEEU v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCAFC 2; 150 FCR 214 at 257 [190]–[192]; *Singh v Minister for Immigration and Border Protection* [2016] FCA 141; 247 FCR 554 at 564 [36]; *Minister for Immigration and Citizenship v SZQRB* [2013] FCAFC 33; 210 FCR 505 at 546 [201]; *Minister for Immigration and Border Protection v SZVCH* [2016] FCAFC 127; 244 FCR 366 at 380 [47] and 383 [61]; and *Wozniak v Minister for Immigration and*

Border Protection [2017] FCAFC 148; 258 FCR 147 at 156 [35].

10 As the Court of Appeal said in *Gett v Tabet* at 254 ALR at 565–567 [292]-[301] after referring to the above passage from *Transurban*, a decision to depart from earlier authority involves not only a consideration of the jurisprudential nature and character of the error that leads to the conviction of past error, but also other considerations such as, by way of example, whether the earlier decision rested on principle carefully worked out and whether the earlier decision had been otherwise acted upon.

11 Further, as the Court said in *Gett v Tabet* at 563 [283] the adverb "plainly" may have different work to do in different contexts:

> In the jurisprudence of the Federal Court, on a number of occasions, the expressions "plainly" or "clearly" wrong have been used: see, for example, *Transurban City Link Ltd v Allan* (1999) 95 FCR 553; 168 ALR 687; 57 ALD 583; [1999] FCA 1723 at [26]–[31] (Transurban), especially [29]; *New Zealand v Moloney* (2006) 154 FCR 250; 235 ALR 658; [2006] FCAFC 143 at [133]–[139]. This can be seen to have been influenced by the use of the expression "plainly wrong" by the High Court in *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485 at 492; 112 ALR 627 at 628-9; [1993] HCA 15 (*Marlborough Gold Mines*). However, it is clear from the discussion in *Transurban* that those adverbs "plainly" or "clearly" do not limit the circumstances of departure to those in which error is patent or obvious or easily perceived. Rather they bespeak the quality of the error or the level of conviction of error that must be perceived: compare *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476; 195 ALR 24; 72 ALD 1; [2003] HCA 2 at [13] (per Gleeson CJ). The reference in *Telstra Corporation Ltd v Treloar* (2000) 102 FCR 595; [2000] FCA 1170 at [28] (*Telstra Corporation*) to "patent" is to be understood in its context of the approach to statutory interpretation, over which minds might reasonably differ.

12 In *Gett v Tabet* the Court was dealing with an important principle of the common law as to whether damages could be awarded for the loss of chance of a better medical outcome. Using the phrase "plainly wrong" dictated by *Farah Constructions* the Court engaged deeply with applicable principle and departed from a decision of the Victorian Court of Appeal and an earlier decision of the New South Wales Court of Appeal. The Court did so convinced as it was of the error of the approach of these earlier decisions.

13 The approach of the Court of Appeal in that case does not mean that in all cases a Full Court must, or even should, engage in wholesale reconsideration of earlier authority whenever a party challenges it. This is especially so in this Court in the field of migration law so heavily regulated by complex and voluminous legislation, fought over on a daily basis in a constant flow and volume of cases. There are important considerations of the authority of the Court and institutional integrity to be considered. In *Hicks v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCA 757 at [75]-[76] French J said the following, albeit about the position of a single judge following an earlier decision of a single judge:

> 75 It is well established that a judge of this Court should follow an earlier decision of another judge unless of the view that it is plainly wrong - *Takapana Investments Pty Ltd v Teco Information Systems Co Ltd* (1998) 82 FCR 25 at 33 (Goldberg J), citing *Towney v Minister for Land and Water Conservation for New South Wales* [1997] FCA 656; (1997) 147 ALR 402 at 412 and *Esso Australia Resources Ltd v Commissioner of Taxation* (Cth) (1997) 150 ALR 117 at 121. See also *La Macchia v Minister for Primary Industries and Energy* (1992) 110 ALR 201 at 204 where Burchett J said:
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> > "The doctrine of stare decisis does not, of course, compel the conclusion that a judge must always follow a decision of another judge of the same court. Even a decision of a single justice of the High Court exercising original jurisdiction, while 'deserving of the closest and respectful consideration', does not make that demand upon a judge of this court: *Businessworld Computers Pty Ltd v Australian Telecommunications Commission* [1988] FCA 206; (1988) 82 ALR 499 at 504. But the practice in England, and I think also in Australia, is that 'a judge of first instance will as a matter of judicial comity usually follow the decision of another judge of first instance [scil of coordinate jurisdiction] unless he is convinced that the judgment was wrong': Halsbury, 4th ed, vol 26, para 580. The word 'usually' indicates that the approach required is a flexible one, and the authorities illustrate that its application may be influenced, either towards or away from an acceptance of the earlier decision, by circumstances so various as to be difficult to comprehend within a single concise formulation of principle ... "
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> 76 The injunction to judicial comity does not merely advance mutual politeness as between judges of the same or co-ordinate jurisdictions. It tends also to uphold the authority of the courts and confidence in the law by the value it places upon consistency in judicial decision-making and mutual respect between judges. And where questions of law, and statutory construction, are concerned the proposition that a judge who has taken one view of the law or a statute is 'clearly wrong' is one not lightly to be advanced having regard to the choices that so often confront the courts particularly in the area of statutory construction. .

As explained in the cases which Allsop CJ mentioned, the rationale behind the principle that a court should normally follow an earlier decision unless convinced it is plainly wrong is founded in the doctrine of precedent and the importance of the predictability of the law and this Court should not depart from the majority decision in *McCallum* unless it is convinced that the majority decision was plainly wrong.

11 In this case, counsel for the appellant, far from seeking to persuade this Court that the majority decision in *McCallum* was plainly wrong, did no more than advance arguments said

to "favour" the decision of Hill J. However, it is not open for this Court to disturb the authority of the majority decision in *McCallum* simply because those arguments, if accepted, may cause this Court to prefer the decision of Hill J over the majority. *McCallum* is an authority of long standing, which has been applied many times and, absent the presentation of cogent and forceful submissions directed at persuading this Court that the majority decision in *McCallum* is plainly wrong (which was not the case here), there is no justification for this Court to undertake a reconsideration of that decision.

12 There is a third reason for dismissing the appeal. *McCallum* is not authority that a bankrupt will never have standing under s 14ZZ of the *Taxation Administration Act*. Both Whitlam and Lehane JJ acknowledged that it was "conceivable" that "there may be some other footing in which [a bankrupt taxpayer] could claim standing" as a person "dissatisfied" with an objection decision, other than because of the taxation debt (*McCallum*, 475). The example given was that an objection decision in relation to a particular assessment may have consequences for the tax payable in years following discharge from bankruptcy, for which the bankrupt will be personally liable. Before the Tribunal, counsel argued that Ms Pitman was relevantly "dissatisfied" with the objection decision, within the meaning of s 14ZZ(1)(a), because of the criminal charges laid against her for allegedly evading payment of her tax debt. The following written submission (but no evidence) was filed in support of that contention:

> The gravamen of the criminal allegations is that the Applicant obtained a financial advantage by evading payment of the tax debt owed to the Respondent. It follows that if there was, in fact, no tax debt then the Applicant could not have obtained a financial advantage (whether by deception or otherwise).
>
> If the Tribunal were to review the decision of the Respondent and overturn the original decision, it is reasonably arguable that the Applicant could not be convicted of the charges laid against her. If the tax debt, in effect, never existed then the Applicant could not have obtained any financial advantage.
>
> Such a submission, we consider, would be open at committal (to discharge the Applicant from standing trial for the offences) and/or at the close of the prosecution case at trial (there being no case for the Applicant to answer). Similarly, the submission would be that no properly instructed jury could convict the Applicant of the charges as there was no financial advantage obtained.
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> In the alternative, the Applicant could also adduce evidence of the successful review to raise a reasonable doubt as to her state of mind at the time of her alleged conduct (*mens rea* or fault element). Even if the effect of a successful review is that the tax debt existed at the time of her alleged conduct, the prosecution is still required to prove that she acted dishonestly (with the requisite intent).

> The ability of the Applicant to put before the jury (as the triers of fact) that the tax debt was subsequently overturned, is reasonably capable of raising a reasonable doubt as to the Applicant's intention to evade the debt dishonestly. That is, if the fault element (dishonesty) cannot be proven to the requisite standard, the Applicant is entitled to be acquitted of the offences charged.

13 The Tribunal rejected the submission that the existence of the charges gave Ms Pitman standing to seek review of the objection decision, as a person "dissatisfied" with the objection decision. The Tribunal reasoned as follows:

> 79 The nature of the application is to set aside the Commissioner's objection decision. Even if she were successful, it does not reflect on the essential elements of the criminal charges brought against her. Three of the charges are focused on the judgment debt of $2,057,798.53 entered against her in the Supreme Court of Victoria on 21 December 2017 and on whether she dishonestly obtained for herself a financial advantage from the ATO by evading that debt. The way in which she is alleged to have evaded that debt varies from charge to charge. Under the first, she is alleged to have given the Australian Financial Services Authority false or misleading information when she completed her statement of affairs as she was obliged to do under the Bankruptcy Act. Setting aside the Commissioner's assessment in any proceedings in the Tribunal would not have any impact on the elements of that charge.
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> 80 The second and third charges relate to her alleged concealment of property on, in the second charge, 17 June 2015 and 21 October 2017 in the case of the third. The earlier date precedes her lodging an objection against the amended assessments, the date a final order was made against her by the Supreme Court and her lodging a debtor's petition. Whether Ms Pitman was acting dishonestly will depend upon her mental state at the time on 17 June 2015 and the circumstances applying at the time. The fact that she had lodged an objection before 17 June 2015 might be a relevant factor weighing against a determination that she had no belief that she had a legal right to gain a financial advantage but the ultimate success or otherwise of any outcome of her objection or its subsequent review is not.
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> 81 The facts alleged in the third charge relate to 21 October 2017. That was shortly before Ms Pitman's objection was disallowed by the Commissioner. Again, the outcome of any review of the Commissioner's decision would not reflect on her mental state on 21 October 2017. A factor that might be relevant in showing her mental state and whether she acted dishonestly might be that she had not lodged an application for review of the Commissioner's objection decisions after she received notice of his decision dated 31 October 2016. It might be relevant that she did not lodge an appeal against the Supreme Court's judgment delivered on 20 December 2017.
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> 82 The fourth charge is that of conspiring with another or with others to cheat and defraud the ATO of her liability for an income tax debt by deception. Having regard to ss 321D and ss 321(2) and (3) of the Crimes Act, the Crown must both prove that Ms Pitman intended to commit the crime and must have believed that the tax debt, an element of the offence, existed at the time i.e. between 7 August 2014 and 3 April 2018. The Crown's task is not altered or affected by any subsequent application that she may be permitted to make to

the Tribunal or even by any decision that might be made on any such review. Sections 321(2) and (3) provide:

> "***Conspiracy to commit an offence***
>
> *(1)* ...
>
> *(2)* *For a person to be guilty under subsection (1) of conspiracy to commit a particular offence both he and at least one other party to the agreement—*
>
> *(a)* *must intend that the offence the subject of the agreement be committed; and*
>
> *(b)* *must intend or believe that any fact or circumstance the existence of which is an element of the offence will exist at the time when the conduct constituting the offence is to take place.*
>
> *(3)* *A person may be guilty under subsection (1) of conspiracy to commit an offence notwithstanding the existence of facts of which he is unaware which make commission of the offence by the agreed course of conduct impossible*."

> 83 These are not matters for me to decide. What I must decide is whether any review of the Commissioner's objection decision, and any successful outcome for Ms Pitman of such a review, could have any relevance in the hearing of the criminal charges so that I might say that she is a person dissatisfied with the objection decision. While an application made within 28 days of the objection decision might possibly have had some relevance, an application for review lodged almost four years out of time does not. Therefore, I am not satisfied that Ms Pitman is a person who is dissatisfied with the Commissioner's objection decision. She is not a person entitled to lodge an application under s 14ZZ(1)(a) of the [*Taxation Administration Act*] and so not a person entitled to seek an extension of time under s 29(7) of the [*Administrative Appeals Tribunal Act 1975* (Cth)] within which to do so.

14 As those reasons demonstrate, the Tribunal carefully considered and addressed the question of whether Ms Pitman was a person who is dissatisfied with the Commissioner's objection decision by reference to the charges brought against her. Relevantly, counsel for Ms Pitman did not argue that the Tribunal misunderstood or misconstrued the charges. Rather counsel's argument was that the Tribunal should have concluded on the basis of the written submissions put before it as to the effect of a successful review in respect of a conviction on the criminal charges that there was a basis for Ms Pitman's "dissatisfaction" with the objection decision. That argument was not the subject of any ground of appeal and, it would appear, was advanced in response to the Commissioner's notice of contention that the Tribunal was bound to find that Ms Pitman was not a person "dissatisfied" with the objection decision, in the absence of evidence as to the consequences of a successful review of that objection decision with respect to the criminal charges against her. In so far as leave is

required for Ms Pitman to put forward her argument, leave is given but the new contention does not assist her.

15 Whether or not Ms Pitman was "dissatisfied" in the relevant sense was a factual inquiry and the determination of whether a successful review of the objection decision could be advanced in Ms Pitman's interests in relation to charges against her, or the conduct of her trial, required the Tribunal to make a finding on that issue. The difficulty for Ms Pitman was that the submissions were not evidence and she otherwise did not lead any evidence, apart from the charge sheet, upon which her "dissatisfaction" might be established. The determination of that factual inquiry, however, was an evaluative task which involved a consideration of the nature of the charges against Ms Pitman, which, because no other evidence was led, such as by adducing evidence from experienced counsel as to the running of the trial, provided the only objective basis upon which to assess the impact of a successful review upon those charges. Indeed, consideration of the very careful reasoning of the Tribunal (tellingly not challenged on appeal) illustrates why the Tribunal did not err in its approach to its consideration of the factual inquiry. Absent other evidence upon which to evaluate whether or not a successful review could have an impact on the charges against Ms Pitman or her criminal trial, the Tribunal approached the task by a logical analysis of the elements of the charges about which, as stated, no issue was taken that the Tribunal either misunderstood or mischaracterised those charges.

16 The Tribunal's decision did not involve any error of law and the appeal must therefore be dismissed. It follows that there is also no need to consider the Commissioner's notice of contention or the application by Ms Pitman to adduce fresh evidence, as the fresh evidence upon which she would seek to rely would only have relevance on the question of the relief to be granted if the Court found legal error in the Tribunal's decision, which it has not. That question would arise because the State charges against Ms Pitman have since been withdrawn and the withdrawal puts into issue whether there would be any utility in remitting the matter to the Tribunal (which is the relief sought by Ms Pitman) if Ms Pitman succeeded on her appeal. The fresh evidence on which Ms Pitman would seek to rely, if it was necessary to consider the utility of the remitter issue, is the prospect that Commonwealth charges would be brought against her and we note, for completeness, that counsel for Ms Pitman has since informed the Court by email that Ms Pitman has been charged with Commonwealth offences.

However, in view of our conclusion that the Tribunal did not err in law, the fresh evidence application has no bearing on the outcome of the appeal.

I certify that the preceding twelve (12) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Davies.

Associate:

Dated: 16 December 2021

REASONS FOR JUDGMENT

BROMWICH J:

Introduction

17 This is an appeal under s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth) from a decision of the Administrative Appeals Tribunal. The Tribunal dismissed an application for an extension of time in which to lodge an application for review of a decision of the respondent, the Commissioner of Taxation. In October 2016, the Commissioner had disallowed objections by the applicant, Ms Debbie Pitman, to income tax assessments made in August 2014 for the financial years ending 30 June 2011, 2012 and 2013. The basis for the assessments was unexplained deposits of money into a bank account in her name, which were treated as assessable income. In December 2017, a final order was made against Ms Pitman in the Supreme Court of Victoria for just over $2 million in favour of the Commissioner, being a tax debt arising out of the income tax assessments. In January 2018, she filed for bankruptcy, and in April 2018 she was declared bankrupt.

18 In October 2019, Ms Pitman was charged with four criminal offences, alleged to have taken place in the period between when the income tax assessments were made in August 2014 and the declaration of bankruptcy in April 2018. Each criminal charge was related to the tax debt or the administration of her bankrupt estate.

19 In August 2020, Ms Pitman made an application under s 14ZZ(1)(a)(i) of the *Taxation Administration Act 1953* (Cth) (***TA Act***) to the Tribunal to review the Commissioner's objection decision, and an application for an extension of time within which to bring her review application. Section 14ZZ(1) of the *TA Act* provides:

> If the person is dissatisfied with the Commissioner's objection decision (including a decision under paragraph 14ZY(1A)(b) to make a different private ruling), the person may:
>
> (a) if the decision is a reviewable objection decision—either:
>
> (i) apply to the Tribunal for review of the decision; or
>
> (ii) appeal to the Federal Court against the decision; or
>
> (b) otherwise—appeal to the Federal Court against the decision.

20 The live question before the Tribunal was whether Ms Pitman was a person "*dissatisfied*" with the Commissioner's objection decision for the purposes of s 14ZZ(1)(a)(i), given that her financial affairs had become the responsibility and concern of her trustee in bankruptcy. In order to have standing, she had to have an interest in the review application outcome that transcended the financial and related interests of her bankrupt estate. The Tribunal found that she did not have such a transcendent interest. The application for the extension of time in which to bring the application for review of the Commissioner's decision was therefore dismissed.

Before the Tribunal

21 Ms Pitman had been charged with four criminal offences under Victorian State law in October 2019, not federal offences under Commonwealth law. They comprised three charges of obtaining a financial advantage from the Australian Taxation Office (**ATO**) by deception contrary to s 82(1) of the *Crimes Act 1958* (Vic), and one charge of conspiracy to cheat and defraud the ATO of her liability for an income tax debt by deception, an offence at common law. The making of her August 2020 review application and extension of time application to the Tribunal was apparently motivated by the criminal charges brought against her, and the impact that a successful review application might have on her chances of defeating some or all of those charges.

22 Before the Tribunal, Ms Pitman accepted that ordinarily, as a bankrupt, she would not be a person who was "*dissatisfied*" for the purposes of s 14ZZ(1)(a). However, she argued that because of the criminal charges she was facing, the Commissioner's objection decision would have consequences for her that transcended her discharge from bankruptcy so as to give her standing. That was argued to be so because the four charges related to amounts that were the product of the assessments and the subject of the Commissioner's objection decision. Her argument was that if the review application was successful, the tax debt would cease to exist and a foundational element of at least the first three charges of obtaining a financial advantage by deception would no longer exist. For present purposes it is not necessary to address the otherwise live question of whether, even with the tax debt in existence, taking steps to prevent it being paid could ever constitute the *obtaining* of a benefit.

23 An alternative argument advanced by Ms Pitman was that even if the tax debt existed at the time of her conduct, all of which took place after the assessments had been made, she could

rely upon those assessments being set aside and the tax debt being eliminated, or at least being of a different quantum, to raise a reasonable doubt as to the state of mind element of dishonesty.

24 The Tribunal considered the arguments advanced in some detail by reference to the nature of the charges and their elements, and a body of appellate authority in the High Court and in intermediate appeal courts, and how that interacted with the objection review rights in the *TA Act* and the obligations imposed by the *Bankruptcy Act 1966* (Cth). In the course of that exercise, the Tribunal considered and applied the decision of the majority of the Full Court in ***McCallum*** *v Commissioner of Taxation* [1997] FCA 533; 75 FCR 458 per Lehane J, with whom Whitlam J agreed, Hill J dissenting.

25 The Tribunal concluded that even if Ms Pitman was successful in her review application, that would not reflect on the essential elements of the criminal charges, largely because the assessments and the objection decision all took place before the alleged conduct upon which the criminal charges were based. The Deputy President concluded that the review application and any successful outcome for Ms Pitman could not have any relevance to the hearing of the criminal charges so as to make her a person dissatisfied with the objection decision.

The Full Court decision in *McCallum*

26 In *McCallum*, Lehane J applied the decision of the High Court in ***Cummings*** *v Claremont Petroleum NL* [1996] HCA 19; 185 CLR 124, which by majority found that the right to pursue an appeal against the objection decision of the Commissioner is not "*property*" which vests in a trustee in bankruptcy. The bankrupts in *Cummings* did not have standing to appeal a judgment against them because they had no identified interest in the outcome of the proceeding which went beyond the effect of bankruptcy. That was because their assets and financial interests, being the only issue they sought to vindicate, had vested in the trustee in bankruptcy. The standing of a bankrupt to bring an objection review application before the Tribunal therefore turns on having an interest which is not itself subsumed by the effect of bankruptcy.

27 In *McCallum*, Lehane J was troubled by a range of potential outcomes in some circumstances if either a bankrupt, or a trustee in bankruptcy, could not challenge an adverse objection decision by the Commissioner. Even though *McCallum* was concerned with the bankrupt's standing to apply for a review by the Tribunal, his Honour assessed the related question of

standing of both a bankrupt and a trustee in bankruptcy as a question of construction of the assessment, objection and objection appeal provisions of the *Income Tax Assessment Act 1936* (Cth) and the corresponding objection appeal provisions in the *TA Act*. His Honour observed that this course of considering both perspectives was taken in *Cummings*. His Honour started with the position of the trustee, and then turned to the position of the bankrupt.

28 For the trustee, Lehane J considered that the three questions posed by s 14ZZ(1) were whether the trustee was "*the person*" referred to in that provision; whether the trustee was appropriately described as "*dissatisfied*"; and whether an application under that provision fell within the power in s 134(1)(j) of the *Bankruptcy Act*, namely, the power to "*bring, institute or defend any action or other legal proceeding relating to the administration of the estate*": *McCallum* at 472D.

29 Lehane J readily answered the second and third questions in favour of the trustee: the trustee was able to be characterised as "*dissatisfied*" if they considered the assessment excessive and thus prejudicial to other creditors; and the power in s 134(1)(j) should not be read in a way that narrowed rather than enlarged the authority of a trustee to take appropriate steps in the administration of an estate for the benefit of those having a claim upon it, such that "*legal proceeding*" encompassed Tribunal proceedings.

30 In relation to the first question, while "*the person*" in s 14ZZ(1) and other provisions dealing with making objections to assessments was the bankrupt taxpayer, such that the trustee had no power to lodge an objection, Lehane J concluded that this did not preclude the exercise of review or appeal rights under s 14ZZ of the *TA Act*, not as the exercise of a property right of the bankrupt, but rather because, like an appeal against a judgment debt, it was a proceeding relating to the administration of the estate authorised by 134(1)(j) of the *Bankruptcy Act*. However, that conclusion did not mean that Mr McCallum necessarily lacked standing also to apply for a review of the objection decision whilst a bankrupt, provided he could properly be regarded as a person who was dissatisfied with the Commissioner's objection decision.

31 Lehane J considered the related concepts pertaining to standing of being "*a person who is aggrieved*" by a decision or conduct for the purposes of seeking judicial review under ss 5(1) or 6(1) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth), or "*a person interested*" in a decision or conduct under s 12(1) of that Act. His Honour also considered

general law requirements for standing to obtain a declaration of right or an injunction to restrain the infringement of a public right. His Honour concluded that it was difficult to see why "*dissatisfaction*" would bestow any more generous an outcome as to standing on a bankrupt taxpayer seeking a review of an adverse objection decision, than on a bankrupt person seeking to appeal against a judgment for debt.

32 Applying these conclusions, Lehane J found that Mr McCallum was "*likely*" to lack standing to apply to the Tribunal for a review of the objection decision. His Honour deliberately used that word to reflect the fact that Mr McCallum would not have standing merely because, for example, a successful challenge to the objection decision might produce a surplus in his estate, or because of any effect that the assessments or objection decision might have on his reputation. However, his Honour found that it was conceivable that there may be some other footing by which standing could be claimed, such as an objection decision having consequences in relation to tax payable in years following discharge from bankruptcy, for which Mr McCallum would be personally liable. In that event, the dissatisfaction would extend beyond the effect of bankruptcy, and Mr McCallum would have standing. Accordingly, the Tribunal's decision was set aside by reason of being contrary to *Cummings*, giving Mr McCallum an opportunity to claim standing.

The grounds of appeal and the Commissioner's notice of contention

33 Ms Pitman by her counsel pressed only the following grounds of appeal, abandoning at the hearing the remaining two grounds in the notice of appeal:

> [1] The Tribunal erred in law in deciding that the Applicant is not a person who is, within the meaning of s 14ZZ(1)(a) of the *Taxation Administration Act 1953*, "dissatisfied" with the Commissioner's objection decision and therefore the Applicant is not entitled to make an application to the Tribunal for review of that objection decision [7, 83 & 84].
>
> [2] The Tribunal misunderstood and/or misapplied the decision of the Full Federal Court in *McCallum v Commissioner of Taxation* [1997] FCA 533.

34 Ms Pitman asserted that the dissenting judgment of Hill J in *McCallum* should now be followed, or in the alternative that she fell within a broad understanding of "*dissatisfied*" identified by Lehane J in *McCallum* at 475E, summarised above. The reasoning of Lehane J in *McCallum* has been followed by innumerable decisions of this Court in the intervening almost quarter of a century. His Honour's decision is plainly correct and should continue to be followed, obviating any need to consider the question of whether there is any issue of that

decision being plainly wrong: see *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v FAK19* [2021] FCAFC 153 per Allsop CJ. In any event, I would not depart from Lehane J in *McCallum* for the reasons given by both the Chief Justice and Davies J.

35 For the reasons given by Davies J, the applicant has failed to establish any error of law on the part of the Tribunal. In particular, I agree with her Honour's conclusions that:

(a) the constitutional argument must fail because s 14ZZ does not operate to impose an incontestable tax liability on a taxpayer, following *Giris Pty Ltd v Commissioner of Taxation (Cth)* [1969] HCA 5; 119 CLR 365 at 378–379;

(b) there was no legal error established in the Tribunal's application of *McCallum*, nor was any other vitiating legal error established;

(c) there is no need to consider the Commissioner's notice of contention to the effect that Ms Pitman had not adduced any actual evidence that the objection decision might, if not set aside, have consequences for her consistent with *McCallum*, to which I add the note that the Full Court should ordinarily confine itself to considering "*only those issues which it considers to be dispositive of the justiciable controversy raised by the appeal*": *Boensch v Pascoe* [2019] HCA 49; 268 CLR 593 at [7]–[8], [101];

(d) there is no need to consider Ms Pitman's application to adduce fresh evidence of her now being charged, as a discharged bankrupt, with federal offences, because that could only be relevant to the question of remitter, which does not arise as the Tribunal's decision stands.

36 The application must therefore be dismissed with costs.

I certify that the preceding twenty (20) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Bromwich.

Associate:

Dated: 16 December 2021